



DIRECTIVE NUMBER: 9375.7-02

TITLE: Obligation of Funds Under Superfund  
State Contracts

APPROVAL DATE: 8/5/93

EFFECTIVE DATE: 8/5/93

ORIGINATING OFFICE: OERR

☒ FINAL

☐ DRAFT

LEVEL OF DRAFT

☐ A — Signed by AA or DAA

☐ B — Signed by Office Director

☐ C — Review & Comment

REFERENCE (other documents):

---

**OSWER OSWER OSWER**  
**VE DIRECTIVE DIRECTIVE DI**

---

---



DIRECTIVE NUMBER: 9375.7-02

TITLE: Obligation of Funds Under Superfund  
State Contracts

APPROVAL DATE: 8/5/93

EFFECTIVE DATE: 8/5/93

ORIGINATING OFFICE: OERR

☒ FINAL

☐ DRAFT

LEVEL OF DRAFT

☐ A — Signed by AA or DAA

☐ B — Signed by Office Director

☐ C — Review & Comment

REFERENCE (other documents):

---

***OSWER OSWER OSWER***  
***DIRECTIVE DIRECTIVE***

---

United States Environmental Protection Agency Washington, DC 20460		1. Directive Number 9375.7-02
OSWER Directive Initiation Request		
2. Originator Information		
Name of Contact Person Betti VanEpps	Mail Code 5201G	Office OERR
		Telephone Code 260-9760
3. Title Obligation of Funds Under Superfund State Contracts		
4. Summary of Directive (include brief statement of purpose) This memorandum clarifies EPA's interpretation of 40 CFR Part 35, Subpart O, regarding the relationship between cost share assurances in Superfund State Contracts (SSCs) and the obligation of remedial action funds.		
5. Keywords 40 CFR Part 35, Subpart O, and remedial action funds		
6a. Does This Directive Supersede Previous Directive(s)? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes         What directive (number, title)		
b. Does It Supplement Previous Directive(s)? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes         What directive (number, title)		
7. Draft Level <input type="checkbox"/> A -- Signed by AA/DAA <input type="checkbox"/> B -- Signed by Office Director <input type="checkbox"/> C -- For Review & Comment <input type="checkbox"/> D -- In Development		

8. Document to be distributed to States by Headquarters?

☐ Yes
 ☒ No

**This Request Meets OSWER Directives System Format Standards.**

9. Signature of Lead Office Directives Coordinator

*Betti VanEpps*

Date

8/25/93

10. Name and Title of Approving Official

Henry L. Longest, II, OERR

Date

8/15/93

EPA Form 1315-17 (Rev. 5-87) Previous editions are obsolete.

OSWER	OSWER	OSWER	O
VE	DIRECTIVE	DIRECTIVE	DIRECTIVE



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

AUG 5 1993

OERR DIRECTIVE 9375.7-02

OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

**MEMORANDUM**

**SUBJECT:** Obligation of Funds Under Superfund State Contracts

**FROM:** Henry L. Longest II, Director  
Office of Emergency and Remedial Response

**TO:** Director, Waste Management Division  
Regions I, IV, V, VII  
Director, Emergency and Remedial Response Division  
Region II  
Director, Hazardous Waste Management Division  
Region III, VI, VIII, IX  
Director, Hazardous Waste Division  
Region X  
Director, Environmental Services Division  
Regions I, VI, VII

**PURPOSE**

This memorandum clarifies EPA's interpretation of 40 CFR Part 35, Subpart O, regarding the relationship between cost share assurances in Superfund State Contracts (SSCs) and the obligation of remedial action funds. EPA's policy is that remedial design monies may be obligated to another Federal agency to initiate the procurement process for a remedial action contract before an SSC is executed. However, the memorandum also reiterates Agency policy that an SSC must be in place before funds may be obligated for initiating or continuing remedial action.

**BACKGROUND**

**General**

Section 104(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, states that "[t]he President shall not provide any remedial action...unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing [various specified] assurances...." The National Contingency Plan interprets this statutory provision to require that the "assurances must be provided by the State prior to the initiation of



remedial action pursuant to a Superfund State Contract..." (40 CFR § 300.510, emphasis added).

Regional Offices have indicated that State processes to approve or amend SSCs are sometimes slow and cumbersome. This memorandum addresses two questions Regional Offices have raised as possible ways to avoid project delays because of the State approval process:

- 1) Can EPA obligate funds to another Federal agency or contractor before an executed SSC is in place?
- 2) Can EPA use the Subpart O reconciliation clauses during financial settlement of a remedial action in lieu of amending an SSC whose cost share provisions have been exceeded?

#### Obligation of Funds

Section 35.6800(a)(1) of the final 40 CFR Part 35, Subpart O, states that an "SSC with a State or Indian Tribe is required before EPA can obligate or transfer funds for an EPA-lead remedial action" (emphasis added).<sup>1</sup> The preamble to Subpart O (55 FR 22994, at 23005, June 5, 1990) noted that one commenter had objected that "requiring executed SSCs before EPA initiates a remedial action delays the start of such actions up to two months." The EPA response to this comment was:

When the State is not the lead agency for a response action, the State must still provide its CERCLA section 104(c) assurances in an SSC before EPA can obligate Trust Fund monies for the remedial action. Delays while an SSC is being developed are a management problem that should be addressed earlier in the process. Procurement activities through the bid process and up to the contract award may be considered part of remedial design rather than remedial action. Therefore, all such actions can proceed before the SSC is in place. Id.

The preamble discussion of procurement activities has led to some questions about exactly when EPA can "obligate or transfer" funds to another agency.

---

<sup>1</sup>The interim final rule provided, "An SSC ...is required before EPA initiates remedial action during an EPA-lead remedial response." 40 CFR § 35.6800(a)(1), 54 F.R. 4132, at 4149 (January 27, 1990). The preamble explained that "a two-party SSC between EPA and the State ...is required ...to obtain the State's CERCLA 104 assurances before Federal-lead remedial action can begin." 54 F.R. at 4133.

Amending SSCs and Using Reconciliation Provisions

At some sites, changed conditions leading to a change order, higher than expected bids, or other circumstances could result in the costs of a project exceeding the estimated cost identified in an SSC, thus affecting the cost share the State initially agreed to pay. Section 35.6805(l)(1) requires formal amendments to an SSC "when alterations to CERCLA-funded activities are necessary or when alterations impact the State's assurances pursuant to the National Contingency Plan and CERCLA, as amended."

In order to prevent interruption of cleanup at a site when circumstances change, some Regional Offices have inquired whether the SSC reconciliation provisions in Subpart O permit EPA to continue conducting remedial action work without having to formally amend an SSC. These provisions, at 40 CFR §§ 35.6805(k) and 35.6805(j)(3), allow some flexibility for States to pay some of their share of project costs during final reconciliation of response costs. Section 35.6805(k) requires an SSC to contain a provision which states that "the SSC remains in effect until the financial settlement of project costs... to ensure that both EPA and the State have satisfied the cost share requirement...." Section 35.6805(j)(3) requires that a State make final payment of its cost share "by completion of all activities in the site-specific Statement of Work...." Exempt from this deadline are "any change orders and claims handled during reconciliation of the SSC [§ 35.6805(j)(3)]," which has led to the questions raised by some Regional Offices.

**IMPLEMENTATION**Obligation of Funds

As explained above, Subpart O does not permit EPA to obligate or transfer remedial action monies to any party (e.g., another Federal agency or a contractor) prior to an SSC being signed. However, EPA may obligate remedial design funds to another Federal agency through an interagency agreement to allow initiation of the procurement process up to the point of soliciting for contract bids. In cases of extreme urgency, a solicitation (for bids on remedial action work) may be issued before an SSC is signed. The solicitation must notify prospective bidders that the availability of funds for the remedial action contract is contingent on EPA and the State concluding an SSC, and that if the SSC is not signed before the bid opening, (1) the solicitation may be cancelled, or (2) the bid opening date may be postponed (giving bidders an opportunity to withdraw, modify, or submit new bids). To ensure that Fund monies are effectively used, procurement activities should be initiated with remedial design funds only when the Region is confident the SSC will be signed before bids are opened.

Amending SSCs and Using Reconciliation Provisions

The March 29, 1993, directive, "Ensuring the Adequacy of Cost Share Provisions in Superfund State Contracts" (Directive No. 9375.7-01), explains that **once all the funds identified in an SSC are expended, "EPA must not obligate more funds until the SSC is amended."** To prevent cleanups from being interrupted, Regional Offices must monitor expenditures under each SSC and begin negotiations to modify the cost provisions of an SSC as soon as it becomes apparent that a shortfall could occur before project completion.

The reconciliation clauses of §§ 35.6805(j)(3) and (k) are to be used only at the time of project closeout, and **must not be used as a substitute for amending an SSC** when cost increases become apparent substantially before the end of the project. The reconciliation provisions are intended to allow EPA and the State to adjust actual cost share amounts to a level of precision possible only after all project costs are fully known. Thus, Section 35.6805(j)(3) applies only to those change orders and claims which cannot be completely determined before project completion.

Please refer any questions on this memorandum to Murray Newton, Chief of the State and Local Coordination Branch, Hazardous Site Control Division (Mail Code 5203G), or Carolyn Offutt, Chief of the State Involvement Section. Both may be reached at 703/603-8840 (voice) or 703/603-9100 (facsimile).

cc: Richard Guimond  
Sallyanne Harper, OARM  
Howard Corcoran, OGC  
Lisa Friedman, OGC  
Regional Waste Management Branch Chiefs  
Regional Removal Managers  
Assistant Regional Administrator for  
Planning and Management Division, Region I  
Assistant Regional Administrator for  
Planning and Management, Region V  
Assistant Regional Administrator for  
Policy and Management, Region II, III, IV, VII,  
VIII, IX, X  
Assistant Regional Administrator for  
Management, Region VI  
Regional Counsels